INDEX

	Page
Opinion below	1
Jurisdiction	2
Questions presented	2
Statute and Rule involved	2
Statement	3
Argument	12
Conclusion	18

CITATIONS

Cases:	
United States v. *On Lee*, 201 F. 2d 722, certiorari denied, 345 U. S. 936	12
United States v. *Rosenberg*, 195 F. 2d 583, certiorari denied, 344 U. S. 838, rehearing denied, 344 U. S. 889, motion to set aside judgment denied, 200 F. 2d 666, petition for rehearing in C. A. 2d denied, Jan. 19, 1953, certiorari denied, 345 U. S. 965, rehearing denied, 345 U. S. 1003, application for stay of execution denied, 346 U. S. 273	4, 12
Statutes:	
Judicial Code, Sec. 2255, as amended (28 U. S. C. 2255)	2
Federal Rules of Criminal Procedure, Rule 33	3

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 497

MORTON SOBELL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

There was no opinion in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on October 8, 1953 (R. 16), and a petition for rehearing (R. 17–23) was denied on October 31, 1953 (R. 114). On November 18, 1953, Mr. Justice Jackson extended the time for filing a petition for a writ of certiorari to December 15, 1953 (R. 115), and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). As to the motion, under Rule 33 of the Federal Rules of Criminal Procedure, for a new trial on the grounds of

newly discovered evidence, see also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a motion under Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the grounds of newly discovered evidence was properly denied where the allegedly newly discovered evidence related only to the credibility of witnesses whose credibility had been in issue at the trial.

2. Whether a motion under 28 U. S. C. 2255 to vacate a sentence for conspiracy to commit espionage was properly denied where petitioner's allegations as to the knowing use of perjured testimony at the trial constitute only renewed attacks on the credibility of witnesses.

STATUTE AND RULE INVOLVED

Section 2255 of the Judicial Code, as amended (28 U. S. C. 2255), provides, in relevant part, that:

> A prisoner in custody under a sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. * * *

Rule 33 of the Federal Rules of Criminal Procedure provides, in relevant part, that:

> The court may grant a new trial to a defendant if required in the interest of justice. * * * A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment * * *. * * *

STATEMENT

On March 29, 1951, petitioner was convicted in the United States District for the Southern District of New York, together with Julius and Ethel Rosenberg (petitioners in Nos. 111 and 687, October Term, 1952, No. 1, Misc., June 15 Special Term, 1953, and No. —, June 18 Special Term, 1953), of conspiracy to commit espionage, and was sentenced to a 30-year term of imprisonment (R. 13). The conviction was affirmed, and a petition for rehearing was denied by the Court of Appeals. *United States* v. *Rosenberg,* 195 F. 2d

583 (C. A. 2). A petition for a writ of certiorari was denied by this Court on October 13, 1952, 344 U. S. 838, and a petition for rehearing was denied on November 17, 1952, 344 U. S. 889 (Nos. 111–112, O. T. 1952). Thereafter, on November 24, 1952, petitioner filed a motion in the sentencing court under 28 U. S. C. 2255, to set aside the judgment of conviction and sentence. The motion was denied; the order of denial was affirmed by the Court of Appeals on December 31, 1952, 200 F. 2d 666 (C. A. 2); and a petition for rehearing in that court was denied on January 19, 1953. A petition for a writ of certiorari to review that proceeding was denied by this Court on May 25, 1953, 345 U. S. 965, and a petition for rehearing was denied on June 15, 1953, 345 U. S. 1003.

On June 5, 1953, petitioner's codefendants, Julius and Ethel Rosenberg, filed a motion (a) under Rule 33 of the Federal Rules of Criminal Procedure for a new trial on the ground of newly-discovered evidence and (b) a second time under 28 U. S. C. 2255 for a vacation of their judgments of conviction on the ground that the prosecution knowingly used perjured testimony to bring about their convictions. On the same day, petitioner made a motion for similar relief, and supported his motion solely by reference to the motion and supporting papers already filed by the codefendants, the Rosenbergs. His motion recites (R. 91):

> The evidence in support of petitioner's claim is fully set forth in the petition and

> affidavits in support submitted by Julius and Ethel Rosenberg in support of a similar alternative motion * * *. The facts set forth in said petition and affidavits were not known to petitioner or his counsel at the time of petitioner's trial nor could they, with the exercise of reasonable diligence, have been ascertained by him.

All of the allegedly newly-discovered evidence related to the credibility of David and Ruth Greenglass, who were the principal government witnesses against the Rosenbergs, but who gave no testimony of any acts committed by the petitioner. The new evidence, and its relationship to the evidence adduced at the trial, is as follows:

1. *The console table.* Both David and Ruth Greenglass testified on their direct examinations that they had been told by the Rosenbergs, in 1945, that a certain console table which the Rosenbergs then had in their apartment was a gift to them from the Russians, and that Julius used the table for microfilming documents. Ruth Greenglass testified that Julius had shown her a hollowed out portion beneath the table which enabled him to use it for this purpose. The Rosenbergs admitted that they owned a console table but otherwise denied the Greenglasses' story, testifying, in fact, that they had bought the only console table they had at Macy's about 1944 or 1945 (R. 30). A rebuttal witness who had worked for a time as a maid for the Rosenbergs thereafter gave testi-

mony which tended to support the Greenglass story, in that she testified (a) that she had been told that the table was a gift (Nos. 111–112, R. 1410), and (b) that the table had for a time been kept in a closet, although it was the best piece of furniture the Rosenbergs had (Nos. 111–112, R. 1411–1412).

In their motion seeking a new trial, the Rosenbergs offered pictures and affidavits which tended to show the belief of certain relatives of the Rosenbergs that they had in their possession the same console table which the Greenglasses claimed to have seen in 1945; and that this console table had no such photographic device as the Greenglasses had described. The papers supporting the motion tended to show that the newly produced table had been taken from the Rosenberg apartment by relatives late in 1951, but that the relatives had not been questioned about it because the Rosenbergs and their counsel had thought that it had been sold as junk (R. 58–59, 72). The Rosenbergs, in addition, offered their own affidavits to the effect that the console table in their apartment in 1951 was the same one that had been there in 1945 (R. 58).

2. *Pretrial statements of the Greenglasses to their counsel.* Four memoranda stolen from the files of the attorneys for David Greenglass are said to be newly-discovered evidence casting serious doubt on the credibility of the Greenglasses.

a. The first of these included the notes of these

attorneys that Ruth Greenglass had told them, in an interview soon after the arrest of her husband and the Rosenbergs, that David had a tendency to hysteria, that he had at various times been delirious, once while he had the grippe, that she had known him since he was ten years old and that he would say things were so even if they were not (R. 37, 82). This is said to have revealed, for the first time, a long-standing and ingrained corruption of character and emotional imbalance which illuminates the role played by Greenglass in bringing about the conviction of the Rosenbergs (R. 37–38).

The same memorandum also included the statement that Ruth said "She would not have allowed her husband to bring anything home after Hiroshima had disclosed what the project was" (R. 83). This is said to be inconsistent with her later testimony at the trial that before Hiroshima Julius told her the nature of the project at which David worked.[1]

b. The second memorandum purported to be David's recollection of what he had told the F. B. I. (R. 84). This shows that there were several discrepancies between the story he told

[1] A significant part of this quote is omitted in the petition for certiorari. The memorandum states: "She would not have allowed her husband to bring anything home after Hiroshima had disclosed what the project was. She intended to raise a family and did not want that kind of material around" (R. 83).

his lawyers that he had told the F. B. I., and his testimony at the trial. Thus, he identified a person with whom he had a meeting at Julius' instance as "a man" whom he did not know to be Russian,[2] whereas, later, on the trial, he testified that the man was a Russian. He described the identifying signal from Gold as a piece of card, although, at the trial, this was a "Jello" box top.

In the memorandum Greenglass stated that his recollection as to certain of the events had been hazy, but that nonetheless he allowed the recollections to go into the statement to the F. B. I., and that he allowed the inclusion of a statement that Harry Gold had come to his apartment in New Mexico twice, after the F. B. I. agents had suggested this was so, although he remembered his having come only once. His testimony at the trial was that Gold had come twice.

The memorandum also showed that Greenglass was attempting to keep his wife's involvement at a minimum. Indeed, in a related memorandum made by the lawyer at his first interview with Greenglass, it appears that Greenglass stated that "he had made a number of confusing statements purposely in order to confound the F. B. I. and to draw attention from his wife who is in the hospital" (R. 87).[3]

[2] That he did not know he was a Russian and so told the F. B. I. appears in a separate memorandum (R. 87).

[3] This fourth memorandum was apparently prepared by the attorney at the time of the interview during which Green-

c. A third memorandum of Greenglass's lawyers showed that there had been a conversation between one of those lawyers and an Assistant United States Attorney which included discussion about whether Greenglass should be indicted in New York. It was stated by the Assistant United States Attorney that counsel for the Rosenbergs had suggested to the court that the failure to indict Greenglass gave the matter the appearance of a deal. It was also stated that if Greenglass were indicted in New York, the United States Attorney in New Mexico where Greenglass had already been indicted would probably agree not to press that indictment. (R. 85.)

The conversation is said to reflect a deal for exchanging light punishment for the Greenglasses for their testimony against the Rosenbergs (R. 42–43).

3. *Theft of uranium.* The Rosenbergs also attached an affidavit from Bernard Greenglass which tended to show that David had stolen a quantity of uranium (R. 44). The attorney's memoranda referred to above indicated that the Greenglasses had been questioned by the F. B. I. about a theft of uranium.

The substance of all of these allegations was also used to support the 2255 motion. It was argued that the United States Attorney must

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glass summarized what he said to the F. B. I. Its details do not need to be separately spelled out, as they do not add anything to the substance of the other three memoranda.

have known of these circumstances making it obvious that the Greenglasses were perjuring themselves, and that his use of the evidence in spite of that fact must therefore be characterized as a knowing use of perjured testimony.

Oral argument was had on the joint motions of the Rosenbergs and petitioner before the district judge who had heard the case-in-chief and who had imposed the sentences, and on June 9, 1953, the motions were denied (R. 109, 112). In his opinion, the judge specifically stated, with respect to the 2255 motions, that "no element of proferred proof supports the allegation that the Government knowingly used perjurious testimony" (R. 109); and, further, with respect to the motions for a new trial (R. 110–112)—

> By no recognized rule of law governing the granting of new trials have the defendants established the right to such relief. At best, the evidence which they would now present to a jury would be cumulative and would be impeaching in character of some witnesses, particularly David Greenglass. * * *
>
> * * * * *
>
> With respect to the diligence required in the uncovering of new evidence, it is noteworthy that * * * all that was necessary * * * in order to locate the console table, was to have asked Ethel Goldberg, Julius Rosenberg's sister, where it was, and then obtain it from the apartment of

> Julius' mother, Mrs. Sophie Rosenberg. But this was not done until March, 1953, * * * although it would seem a logical and natural thing to have done soon after the testimony with regard to the table was given. Or perhaps it was not done by counsel, for he realized how unimportant and unsignificant this testimony was in light of the other testimony at the trial. * * *
>
> * * * * *
>
> * * * the guilt of the defendants was established overwhelmingly, and the present alleged new evidence does not in any way diminish the strength of the Government's case.

The Rosenbergs appealed separately. The Court of Appeals affirmed the order as to them in the following *per curiam* opinion (R. 113):

> Having examined the record we are satisfied that the trial judge committed no error of law and made findings of fact which the evidence amply supports. See *United States* v. *Johnson*, 327 U. S. 106; *United States* v. *On Lee*, [2] Cir. 201 F. 2d 722. The order is affirmed.

As a date for execution had been set for the Rosenbergs before the expiration of the normal time allowed for filing a petition for certiorari to this Court, an application was made by the Rosenbergs for a stay of execution to permit the preparation and filing of the petition. This Court denied that application, thus showing, as this Court stated, "that the Court saw no substantial

question in those proceedings to be preserved for its further consideration" (346 U. S. 273, 281).

Thereafter, petitioner filed his appeal in the present case in the Court of Appeals. On the Government's motion for dismissal of the appeal or summary affirmance, for the reason that the issues presented had already been decided on the Rosenberg appeals, the Court of Appeals affirmed without argument (R. 16). A petition for rehearing, setting out all the proceedings in detail and arguing that the circumstances of the Sobell conviction prevented the disposition of the case as to the Rosenbergs from being conclusive, was denied (R. 114).

ARGUMENT

1. There is no merit to petitioner's contention that he is entitled to a new trial on the basis of newly-discovered evidence. To be entitled to such relief, it is clear that (a) the evidence must in fact be newly-discovered, (b) there must be a showing of diligence in its discovery, (c) the evidence offered must not be merely cumulative or impeaching, (d) it must be material to the issue involved, and (e) it must be of such a nature that, on a new trial, it would probably produce an acquittal.[4] *United States* v. *On Lee,* 201 F. 2d 722, 723, n. 3 (C. A. 2), certiorari denied, 345

[4] Petitioner asserts (Pet. 33) that the requirement that the newly discovered evidence "would probably produce an acquittal" is too severe and that the correct standard is that a new trial should be granted if the newly discovered evi-

U. S. 936. The present case is plainly insufficient by these standards.

The evidence adduced is "cumulative" and "impeaching". It is addressed solely to the credibility of David and Ruth Greenglass, but cannot show that they have perjured themselves. The console table evidence, the attorney's memoranda, the affidavit about David's uranium theft—all of these are at most evidence tending to show that the Greenglasses had some motive to lie and some facts from which it might be inferred that they had done so. But the basic motives of the Greenglasses to lie were thoroughly canvassed at the trial, and circumstances from which a jury could have concluded that they had done so were disclosed. Certainly, additional evidence of the same character, which even on its face permits of innocent explanations, and is not inconsistent with the central aspects of the Greenglasses' testimony, is no basis for granting a new trial.

It was on this basis, and on the fact that as to the console table evidence there was no showing of diligence, that the trial court rejected the Rosenbergs' motions for a new trial (R. 110–111). As to the present petitioner, the argument against a new trial is stronger, for it seems doubtful that the proferred evidence, even if true, is material.

dence would create a "reasonable possibility" of a different result. The newly discovered evidence in this case fails to meet either standard.

The case against petitioner depended only slightly on the testimony of the Greenglasses.

As to petitioner, the jury was charged that it must find that there was a conspiracy "to obtain secret information pertaining to the national defense of the United States, intending to transmit the information to the Union of Soviet Socialist Republics" (Nos. 111–112, R. 1560); and that it must find that Morton Sobell was a member of that conspiracy. The trial court stated (Nos. 111–112, R. 1552):

> You must first determine from all the evidence in the case * * * whether or not a conspiracy existed. If you decide that a conspiracy did exist, you must next determine, as to each defendant, whether or not he was a member of the conspiracy. * * * In considering whether or not a particular defendant was a member of the conspiracy * * * you must do so without regard to and independently of the statements and declarations of others. In other words, you must determine the membership of a particular defendant from the evidence concerning his own actions, his or her own actions, his or her own conduct, his or her own declarations, his or her own statements, and his or her own connection with the actions and conduct of others.

The matter was emphasized later (Nos. 111–112, R. 1560):

> To determine whether Morton Sobell was a member of the conspiracy you are only to consider the testimony of Max Elitcher,

William Danziger and the testimony relating to the defendant Sobell's alleged attempt to flee the country.

It is true that, in finding that a general conspiracy existed, even in the case against petitioner, the jury was authorized to consider the Greenglass testimony. As to that, however, we have pointed out that the proferred evidence basically casts very little doubt on the central aspects of the story. But, in any event, it is clear that testimony of other witnesses which related to the petitioner showed that he knowingly participated with Rosenberg in a conspiracy which contemplated the use of numerous persons for the purpose of obtaining military information for transmission to the Soviet Union, and that there were no restrictions on the kind of data that were useful. That was the essence of the charge and the proof against him. The testimony of Max Elitcher showed that petitioner (1) supplied Rosenberg with military information for transmission to the Soviet Union (Nos. 111–112, R. 239, 260–261); (2) attempted to secure a classified ordnance pamphlet from Elitcher and told Elitcher to see Rosenberg in regard to the pamphlet (Nos. 111–112, R. 245–249); (3) joined Rosenberg, after first having advised Elitcher to see Rosenberg before making a change, in attempting to dissuade Elitcher from leaving his job in the Navy, so that Elitcher might be in a position to furnish information to a "contact" in Washington

(Nos. 111–112, R. 256–257); and (4) asked Elitcher for the names of young engineers who would be likely sources of military information (Nos. 111–112, R. 254), commenting particularly on one such occasion that they should be people who "would not be suspected" (Nos. 111–112, R. 255).

It was the testimony of Max Elitcher,[5] not that of the Greenglasses, which basically established petitioner's guilt. Neither under the instructions, nor in logic, is there any basis for supposing that any possible peripheral doubts cast on the testimony of the Greenglasses, has any relevance to the issues tested on the jury's finding of petitioner's guilt.

2. There is also no merit to petitioner's contention that he is entitled to relief under 28 U. S. C. 2255. He had made no showing of perjury and certainly not of the knowing use of perjured testimony by the prosecution.

It is argued that the Government must have known that the console table would be important, and yet no step was taken by the Government to produce the table at the trial although the Government searched the Rosenberg apartment before the furniture was sold, and must have known that the table was not as the Greenglasses described. The petition does not explain why it should have been assumed that the table in the

[5] Supplemented of course by that of William Danziger and the data as to petitioner's flight.

Rosenbergs' apartment in 1951, at the time of their arrests, was the same table that was in their apartment in 1945, particularly when it was reasonable to suppose that the Rosenbergs had known for some time that the net of investigation was drawing closer to them.

Similarly, there is no basis for the inference of knowing use of perjured testimony from the fact that Greenglasses' statement to his lawyers indicated that he may not have told all of the facts which he later remembered. As the trial court stated: "During cross-examination at the trial, David Greenglass repeatedly asserted that he had given many, as many as six or seven statements, to agents of the Federal Bureau of Investigation; that his early statements had been very general, at the request of these agents, and that he had not at the time of his earlier statements remembered fully all the details which he later supplied" (R. 108). There is no showing that the prosecution was aware that Ruth Greenglass thought, if she did, that her husband was an habitual liar or in any way unstable, save as this was indicated both to the prosecutor and to the jury by Greenglass's testimony.

The same showing of a knowing use of perjured testimony has been held insufficient as to the Rosenbergs. Petitioner's case, if in any way different, is weaker; for the alleged perjury re-

lates to issues about which he was not directly concerned.[6]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitioner for a writ of certiorari be denied.

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JANUARY 1954.

[6] Petitioner argues that the court below erred in relying upon "findings" when in fact no findings were made (Pet. 24–25). The reference to "findings" (R. 113) was obviously intended to apply to the careful and extensive opinion of the trial court (R. 103–112).

U. S. GOVERNMENT PRINTING OFFICE: 1954

Office - Supreme Court, U. S.
FILED
JAN 28 1954
HAROLD B. WILEY, Clerk

IN THE

Supreme Court of the United States

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No. 497

MORTON SOBELL,

Petitioner,

v.

UNITED STATES OF AMERICA.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INDEX

	PAGE
Reply Brief in Support of Petition for Writ of Certiorari	1
Conclusion	7

CASES CITED

Griffin v. United States, 336 U. S. 704	4
United States v. Johnson, 327 U. S. 106	4
United States v. Lekacos, 151 F. 2d 174	5
United States v. Liss, 137 F. 2d 995	5

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

1. The record constrains the Government to admit at least that there were a number of "discrepancies between the story [Greenglass] told his lawyers that he had told the F.B.I., and his testimony at the trial" (Br. Opp. 7-8) and that the evidence showed "facts from which it might be inferred that" the Greenglasses had lied in their trial testimony (Br. Opp. 13).

The effect of this record is sought, nevertheless, to be avoided in various ways:

a. It is suggested that the lies and probable lies now exposed are "not inconsistent with the central aspects of the Greenglasses' testimony" (Br. Opp. 13). This of course depends on what one calls the "central" aspect. If "central" is their self-confessed involvement in a wicked enterprise, perhaps little is subtracted. But if one views as "central" the inculpation of Julius and Ethel Rosenberg, and the proof of a "conspiracy" to which petitioner was claimed to belong, the keystone of the arch is surely gone. At every

crucial point of the involvement of the Rosenbergs—from the alleged preview of secret knowledge of radiation effects (Pet. 12), to the alleged attempt to cause David to flee (Pet. 20-21)—the "central" aspects of the Greenglass story are destroyed or impaired.

The Government submits (Br. Opp. 3-12) a counterstatement of facts, perhaps implying that the statement in the Petition (Pet. 2-22) is too much a product of advocacy. The advocacy, if any, is inherent in the facts: at the only point where even so much as a quotation out of context is attributed to us (Br. Opp. p. 7, n. 1) the added text does not vary in the slightest the significance of the contradiction exposed.[1]

The principal effect of the counterstatement (apart from obscuring petitioner's presentation of the effect of the new evidence in the context of the original trial testimony), is to omit reference to the quite "central" significance of the uranium theft and its suppression (Pet. 15, 20-21) and to overlook some other "central" admissions:

(i) "I didn't know who sent Gold to me" (Pet. 16).

(ii) "I can honestly say the information I gave Gold may be not at all what I said in the statement" (Pet. 17).[2]

b. The Government abandons, in this Court, the contention made below that the console table fabrication should be overlooked as being "*de minimis*".[3] Its present reliance

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[1] The omitted quote: "She intended to raise a family and did not want that kind of material around" in fact enhances the partial quote as demonstrating that Julius could not have told Ruth in November 1944 that the bomb "had dangerous radiation effects" (Pet. 12).

[2] The pencil sketch was put in evidence by Mr. Cohn, for the prosecution, after he procured an affirmative answer to the question he formulated "* * * is this to the best of your recollection an accurate replica * * *" etc. Nos. '11-2, R. 461.

[3] Neither in the District Court nor in the Court of Appeals, in the twenty-seven hour period between the service of the Government's

is on the wholly speculative argument that the console table tendered on the motion may not have been the same one which the Greenglasses "claimed to have seen in 1945" (Br. Opp. 6). But when the motion came on to be heard in the District Court, not only did the Government refrain from offering affidavits of the Greenglasses on the subject; their counsel took the position that "no issues of fact" need be considered (S.M. 120, U.S.D.C., S.D.N.Y., June 8, 1953). And the trial judge declined to inspect the table, or take testimony concerning it; he refrained from determining that it was, or was not, the only such table the Rosenbergs had owned.

The trial judge did not hold, as the Government intimates (Br. Opp. 13) that there was lack of diligence involved in the non-production of the table at the trial. He was earnestly pressed to do so, but went no further than to touch upon the point and suggest that the relatives —who themselves could have had no knowledge on what was crucial—could have been called at the time of the trial. Indeed, if he had found that there had been lack of diligence, it would have been an abuse of discretion, in view of the evidence, internal to the trial record, that defendants and their counsel then believed that their furniture had been "disposed of" (Nos. 111-112, R. 1181; Pet. 8).

c. By a sort of play with words, the concept of "cumulative" is sought to be expanded so as to produce a result incompatible with granting a new trial in any case. The argument is contained in the full paragraph of page 13 of the Brief in Opposition, and is expressed in the Government's proposed reformulation of the First Question Presented. The claim would seem to be that whenever the

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answering affidavits in the District Court on June 8, and conclusion of argument in the Court of Appeals on June 9, was counsel able to present to these courts the proof, internal to the record, of how important the contemporary impact of the console table was (Pet. 8, last quote).

credibility of a prosecution witness is challenged at the trial, subsequent proof that the witness' inculpating testimony is false is but cumulative, and hence a new trial need not be granted. In what trial does not the defense attempt to show that a prosecution witness has lied; on what motion for a new trial will not the effect of the new evidence—if it is worth anything—be to prove the witness a liar?

d. It is extraordinary to have Government counsel present its position to this Court on a matter principally involving review of a denial of a new trial, without once referring in their Brief to either of the Court's most recent decisions on the subject. *Griffin* v. *United States,* 336 U. S. 704; *United States* v. *Johnson,* 327 U. S. 106.

The significance of the omission is perhaps reflected in part in Note 4 (Br. Opp. 12-13) which attributes to petitioner a position which petitioner is able to take only because it was successfully argued to the court by the Solicitor General in *Griffin.* The Government does not say whether the larger considerations which impelled it to take the position it did in *Griffin* have changed. In any event, our position should not be misunderstood: the evidence reviewed at Pet. 2-20 is claimed to have been of a character that would have probably produced an acquittal.

The misplaced footnote (Br. Opp. 18, N. 6) (which should have been placed with the new trial aspects of the case) misconstrues the petition's references to the *Johnson* doctrine. This seems almost too obvious. The point we make at pages 6, 9, 10, 22, 26 and 28 ff. of the Petition (as well as Pet. 24-25) would be without substance if intended to deal merely with the absence of *formal* findings. What the misplaced footnote cannot obscure is that the trial judge made no factual determination within or without his opinion, as to a number of crucial matters, such as whether, i.e., the console table was the same or different; whether David had stolen uranium, etc.

2. In its discussion of the probable impact of the new evidence on petitioner's case, the Government takes the position "the argument against a new trial is stronger" (Br. Opp. 13). But this is contrary to law and logic, and completely inconsistent with the realities of this case, exposed by Judge Frank in his opinion for the Court of Appeals, in the sole review of this conviction.

The Government's argument (Br. Opp. 14-16) contains its own refutation. Sobell's position cannot possibly be *less* strong than that of his co-defendants: the jury before even considering whether he was a member had to find the existence of a conspiracy—*and this they could not have done without the testimony of the Greenglasses.* Without it the "conviction could not stand" (Nos. 111-112, R. 1648; 195 F. 2d 583, 592). Hence the only possible question for discussion is how much *stronger* Sobell's position might be. But to this question neither of the Courts below gave consideration.

Yet the question should not have been free from doubt. The answer is pin-pointed in the unanimous position of the Court of Appeals with respect to one of the principal contentions of this petitioner in No. 112, O. T. 1952, that the verdict against him was vitiated by the wrongful joint trial. Speaking for the Court of Appeals, Judge Frank has said: "If in fact, Sobell is right that two conspiracies were proved, then prejudicial error has been committed" (Nos. 111-112, R. 1664-1665; 195 F. 2d at p. 600). The implication of this statement is independent of that Court's split decision to affirm as to Sobell when it is viewed in the light of the cases involving the claim of improper joinder of two conspiracies, particularly in the Second Circuit (cf. *United States* v. *Liss,* 137 F. 2d 995; *United States* v. *Lekacos,* 151 F. 2d 174, rev'd sub nom *Kotteakos,* 328 U. S. 750). It has been requisite for reversal not only that the conspiracies be shown to be separate, but that there have been a prejudicial impact from the joint trial. On the original appeal below the Government had not

denied and the Court of Appeals readily agreed with petitioner as to the *prejudice:* the record fairly shrieks the fact that the jury's view of the testimony of the single substantive witness against this petitioner was clouded and warped by the horror inspired by the awful import of the testimony of the Greenglasses. And hence, to whatever extent the case against the Rosenbergs might be weakened, even if not enough to produce their acquittal, there would have been a weakening of the slender basis on which this petitioner was convicted.

The argument in the Government's Brief in Opposition [4] is lifted, in substantial part, as to this point, from its Brief in Opposition in Nos. 111-112, O. T. 1952 (cf. pp. 14-16 with pp. 48-49 and 46 there). It would seem that there may be a more direct relationship between the question presented by the present petition and the First Question Presented in No. 112, O. T. 1952, than had originally occurred to counsel, and, should review be granted, a motion for leave to file a second petition for rehearing as to that question might be appropriate.

3. With respect to 2255, the Government asks "why it should have been assumed that the table * * * was the same table" (Br. Opp. 16-17). The short answer is that the law requires it to be assumed. The fact having been sworn to, a disposition based on a contrary assumption cannot be made without a hearing.

The showing in the Petition simply cannot be dismissed as limited to failure of Greenglass to "have told all of the facts which he later remembered" (Br. Opp. 17). But a single example should suffice to show why: if Green-

[4] The "other witnesses" referred to in line 8 of the paragraph on page 15 Br. Opp., was the single witness Elitcher, who did *not* testify that "Sobell had supplied military information," nor do more than have innocent and routine conversations which were completely altered by the insertion of the word or phrase "the espionage business."

glass did not know if the man was a Russian and *"told the F. B. I. that he didn't know"* (R. 87), it taxes credulity too much to suppose that it was an improvement in memory that caused him to testify at the trial that the man was a Russian. If there is an "innocent explanation" for this sort of fabrication, it is not contained in the Brief in Opposition.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be granted.

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